STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	: :	
Implementation of the Federal Communications Commission's Triennial Review Order with respect to Potential Non-impairment Determinations Regarding Unbundled Local Switching for Mass Market Customers in Specific Markets	: : : : : : :	No. 03-0595

SBC ILLINOIS' REPLY IN SUPPORT OF MOTION TO STRIKE

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INTRODUCTION

The issue presented by SBC Illinois' motion to strike is illustrated by these excerpts from CLEC briefs opposing the motion:

- From the brief of Sage, Talk America, *et al.*: "[Talk America witness] Battista expresses the view that, regardless of the Commission's analysis under federal law, Talk America believes that unbundled local switching 'should be preserved under Illinois state law,' and at pages 4 through 6 of his testimony identifies the basis of Talk's view."[1]

- From MCI's brief: "MCI's testimony . . . identif[ies] a kind of 'UNE-L checklist to identify operational issues that must be resolved and go[es] a step further by suggesting ways in which those issues can be resolved so that the impairments that hinder CLECs today from providing services to mass market customers using their own switches." (Sic; sentence incomplete in original.)[2]

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[1] Sage Telecom, Inc., Talk America Inc., and Z-Tel Communications, Inc.'s Opposition to SBC Illinois' Motion to Strike Portions of the Direct Testimony of Gabe Battista, Dr. A. Daniel Kelley, George Ford, and Dana Crowne ("Sage/Talk Br."), at 11.

[2] Response of Worldcom, Inc. d/b/a MCI to SBC Motion to Strike Testimony ("MCI Br."), at 7.

- From the "CLEC Coalition" brief: "[I]f the trigger analysis reveals that CLECs are not impaired, then – the FCC postulates – the potential deployment analysis ought to reveal the same. . . . [T]he relationship between the trigger analysis and the potential deployment analysis must be kept firmly in mind. Much of the testimony SBC seeks to strike explores this relationship . . . .[3]

If the ALJ believes this docket should be used to explore Talk America's view that unbundled local switching should be preserved under Illinois law "regardless of the Commission's analysis under federal law," the ALJ should deny SBC Illinois' motion to strike the testimony of Talk America witness Battista. If the ALJ agrees with MCI that this docket should be used to make a checklist of operational "issues" and to explore ways in which they can be resolved so that something can be done about "impairments that hinder CLECs today from providing services to mass market switches" – even though the only decision the Commission is going to make is whether SBC Illinois has or has not passed the trigger test in geographic markets defined by the Commission – then the ALJ should deny SBC Illinois' motion to strike the testimony of MCI's witnesses. And if the ALJ agrees with the CLEC Coalition that it is essential to keep firmly in mind the potential deployment analysis while applying the trigger analysis, in order to ensure that SBC Illinois passes the trigger test only if it would also pass the potential deployment test, the ALJ should deny SBC Illinois' motion to strike the testimony of the CLEC Coalition's witnesses. We can then have a free-for-all throughout the hearing and the post-hearing briefs, at which point the ALJ can cull from the record the parts that actually have to do with where SBC Illinois has satisfied the trigger test, and can ignore – as the Commission will have to in to render a lawful decision – all the testimony, cross-examination and briefing that has no bearing on that question.

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[3] The CLEC Coalition's Response to SBC Illinois' Motion to Strike and Request for Expedited Ruling ("Coalition Br."), at 7-8.

The judicious way to proceed, however, is for the ALJ to do what judges do: decide what the law says this case is about, and keep out evidence that concerns matters that the law says the case is not about. A passage from MCI's brief (which is duplicated almost verbatim in the CLEC Coalition's brief) shows an almost childlike lack of understanding of this basic concept. It says (MCI Br. 4; *see also* Coalition Br. 2-3),

> SBC has presented its case based on *its* interpretation of the TRO and how *it* believes the Commission should define the market and conduct the trigger analysis . . . , which it is entitled to do. However the SBC's (sic) Motion presumes that its interpretation is correct, which it is not. Rather than allow this Commission to evaluate *all* the evidence to determine *how* to define the markets and *how* to apply the triggers, SBC would preempt reasoned decision making and substitute their own judgment for that of the ALJ and the Commission.

Of course SBC Illinois based its motion on its interpretation of the *TRO*. That is what a party does when it espouses a legal position – it makes an argument based on its view of the law, which in this case is the controlling FCC rules and the *TRO*. What happens then is that the other side presents *its* view of the law, as the CLECs have done. With each side having set forth its understanding of what the law says the parameters of the case are to be, the judge then decides which side is correct, and admits or excludes evidence accordingly. The fact that the parties disagree about the law is not, as MCI implies, a reason to deny a motion to strike, because – and this is critically important – the judge does not look at evidence to decide what the law is; the judge looks at the law. Thus, the CLECs are mistaken when they say the Commission should "evaluate *all* the evidence to determine *how* to define the markets and *how* to apply the triggers." For the FCC has already to a very considerable extent determined, and the law (namely, Rule 319(d)(2)) therefore already to a very considerable extent says how to define the markets and how to apply the triggers. The CLECs' suggestion that the Commission should evaluate all

the evidence that anyone might choose to offer in order to figure out for itself what the FCC has already decided is simply wrong.

Does this mean, as MCI suggests (at 4), that SBC Illinois is advocating a mindless counting exercise where the only question the Commission asks is whether there are three carriers in the market each of which has any UNE-L lines? Or that that there is no such thing as relevant evidence for the trigger case except evidence that carrier X serves X_1 customers, carrier Y serves Y_1 customers and carrier Z serves Z_1 customers in a given market? Not at all. SBC Illinois' motion to strike leaves room for all the legitimate debate the FCC's rule allows concerning how to determine whether a carrier qualifies as a "triggerette"[4] – SBC Illinois has not moved to strike any evidence that could possibly bear on that determination, and SBC Illinois' legal argument was not based on and did not reflect any assumptions about how many customers or what sorts of customers a carrier must serve in order to count as a triggerette. The CLECs' claim that SBC Illinois' motion rests on the premise that the trigger test is a simple counting exercise is a red herring. There are some matters that are irrelevant in a trigger case no matter how many or what kind of customers one thinks a competitor must serve in order to qualify as a triggerette and, as we further demonstrate below, that includes the matters addressed in the testimony SBC Illinois has moved to strike.

If the ALJ is at all inclined to make this docket more manageable by eliminating irrelevant evidence now, rather than allowing it to clog up the proceedings only to be disregarded later, SBC Illinois commends the following Argument to the ALJ's attention.

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[4] By "triggerette," we mean a competing provider serving mass market customers with the use of its own local switch, of which there must be three or more in order for SBC Illinois to satisfy the "local switching self-provisioning trigger" in 47 C.F.R. § 319(d)(2)(iii)(A)(1).

ARGUMENT

I. THE TESTIMONY SBC ILLINOIS HAS MOVED TO STRIKE IS RELEVANT NEITHER TO DETERMINING GEOGRAPHIC MARKETS NOR TO IDENTIFYING CARRIERS THAT QUALIFY AS TRIGGERETTES.

The CLECs do not dispute that the *TRO* provides that when the states examine actual deployment to determine whether the triggers are met, the "states *shall not* evaluate any other factors" (¶ 500) and that it is "*only* if the triggers are not met" that the states are to "apply criteria to assess whether entry is economic" (¶ 425 n.1300). (Emphases added.) With the potential deployment test out of the case, the CLECs therefore go in search of other hooks on which to try to hang their evidence of "operational impairment" (Mr. Starkey's words; *see* SBC Motion at 13), "customer impacting operational issues" (Ms. Lichtenberg's words; *see id*. at 14); and "operational and economic impairments" (Mr. Gillan's words; *see id.* at 15). The CLECs purport to find two such hooks: market definition and the identification of carriers that qualify as triggerettes. The testimony SBC Illinois has moved to strike, however, is relevant neither to determining geographic markets nor to identifying triggerettes.

A. The Testimony At Issue Is Not Relevant To Determining Geographic Markets.

To decide whether testimony is relevant to determining geographic markets, one must first examine how the FCC directed the Commission to go about defining those markets. Then, one asks whether the testimony in question is pertinent to the inquiry the FCC mandated.

The FCC's direction for defining geographic markets appears in 47 C.F.R. § 51.319(d)(2)(i):

> A state commission shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target

> and serve specific markets profitably and efficiently using currently available technologies. A state commission shall not define the relevant geographic area as the entire state.

Thus, there are three things that the FCC has told the Commission to take into consideration when it defines the geographic markets in which it will apply the trigger test: (1) the locations of mass market customers actually being served by competitors, (2) the variation in factors affecting competitors' ability to serve each group of customers, and (3) competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. The underlying discussion in the *TRO* elaborates on what the FCC meant by these three things, but the bottom line remains that in order to be relevant to the geographic market inquiry the FCC has instructed the Commissions to make, evidence must pertain to one of them.

MCI and the CLEC Coalition repeatedly assert that testimony SBC Illinois has moved to strike is relevant to the definition of geographic markets,[5] but they never get around to saying how – never even try to tie their testimony about alleged operational and economic impairment and the virtures of UNE-P to any of the three things that Rule 319(d)(2)(i) says the Commission shall take into consideration. Sage *et al.* at least try to make the connection, but they fail. They correctly observe (Sage/Talk Br. at 2) that Rule 319(d)(2)(i) requires the Commission, when it defines geographic markets, to "take into consideration . . . the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies." That, they suggest, makes relevant "factors affecting competitors' ability to serve" and "competitors' ability

[5] *See, e.g.*, MCI Br. at 4 (Commission should "evaluate *all* the evidence to determine *how* to define markets"; "*How* the markets should be defined . . . requires an understanding of legal issues as well as economic theory); 8 (MCI's "testimony relates directly to understanding *how* markets should be defined"); CLEC Coalition Br. at 3-4.

to target and serve" markets – *i.e.*, all the evidence of operational and economic impairment that SBC Illinois has moved to strike. That sounds good at first blush, but it doesn't work, because in order to have any bearing on the definition of geographic markets, evidence concerning "factors affecting competitors' ability to serve" or "competitors' ability to target and serve" *must somehow distinguish one geographic area from another*. Testimony concerning "operational impairment with regard to IDLC configured loops," for example,[6] is of no use in defining geographic markets if the party offering the testimony does not somehow show that that alleged impairment affects one (potential) geographic area more than another, which might tend to show that the two areas should be in different markets. Testimony that purports only to show that IDLC configured loops are a cause of impairment *generally* cannot be used to determine geographic markets. That, of course, is why Rule 319(d)(2)(i) speaks in terms of "*variation* in factors affecting competitors' ability to serve each group of customers" and "competitors' ability to target and serve *specific* markets." (Emphasis added).

Of all the evidence of operational and economic impairment that SBC Illinois has moved to strike, there is not one piece that suggests in any way that the impairment it is addressing affects one geographic area more than another. Thus, the CLECs' attempt to salvage the testimony on the ground that it relates to the definition of geographic markets is a charade, because none of the testimony can possibly be used to shed light either on what sort of area (MSA, wire center, or cluster of wire centers) the Commission should use as a geographic market, or on where the boundary between one geographic market and its neighbor should be drawn.

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[6] Direct Testimony of Dana Crowne on behalf of Sage and Talk America, p. 10.

There is another way to confirm that none of the testimony SBC Illinois has moved to strike is relevant to the definition of geographic markets: None of it is in testimony that even purports to be addressing geographic markets. The chart set forth below demonstrates this. The middle column identifies the material SBC Illinois has moved to strike from the testimony of each party identified in the left column. The column on the right shows the testimony of that party that purports on its face (by a section heading, for example) to address the definition of geographic markets. There is no overlap between the two – no instance, in other words, where anything SBC Illinois has moved to strike appears in testimony that is speaking to geographic market definition. Moreover, there is no instance in which a party's testimony concerning geographic market definition (the right column) cites to or relies on any testimony that SBC Illinois has moved to strike.

Party	**Testimony SBC Illinois Moved to Strike**	**Testimony re Geographic Market Definition**
MCI	Starkey (all) Lichtenberg (all)	Murray (pp. 40-98)
CLEC Coalition	Gillan (p. 7 line 19 through p. 9 line 4; p. 22 line 1 through p. 24 line 4; p. 87 line 4 through p. 101 line 18; and p. 102 line 1 through p. 105 line 14)	Gillan (pp. 34-71)
Talk America/ Sage	Kelley (p. 6 line 17 through p. 20 line 13); Crowne (p. 10 line 6 through p. 17 line 12; p. 19 lines 1-7; and p. 20 line 1 through p. 21 line 6)	Kelley (pp. 32-45) Crowne (p. 7 through p. 10 line 5) McCausland (pp. 5-9)
Talk America	Battista (p. 4 line 4 through p. 6 line 19; p.15 line 1 through p. 27 line 15; and p. 29 line 12 through p. 35 line 10)	Battista (p. 27 line 17 through p. 29 line 10)
Z-Tel	Ford (p. 7 line 17 through p. 16 line 14; and p. 21 line 11 through p. 25 line 17)	Ford (p. 16 through p. 21 line 9)
Covad	Boone & Murphy (all)	None
AG-CUB	Williams (p. 6 line 9 through p. 7 line 3; p. 10 line 1 through p. 15 line 15; and p. 55 line 11 through p. 57 line 18)	Williams (16-37)

In sum, there are two irrefutable reasons that the testimony SBC Illinois has moved to strike cannot be admitted on the ground that it relates to the definition of geographic markets: first, none it could possibly be used to help define geographic markets, because none of it draws

any distinction between one geographic area and another; and, second, no party in fact makes any attempt to use the testimony to help define geographic markets.[7]

B. The Testimony At Issue Is Not Relevant To Identifying Who Is And Who Is Not A Triggerette.

As we did for geographic markets in the preceding section, we begin by examining what the FCC has said about how to identify a triggerette. 47 C.F.R. § 51.319(d)(2)(iii)(A) provides:

> Local switching self-provisioning trigger. To satisfy this trigger, a state commission must find that three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, *each are serving mass market customers in the particular market with the use of their own local switches*. (Emphasis added.)

According to the rule, then, an unaffiliated competing provider qualifies as a triggerette if and only if it is serving mass market customers in the particular market with the use of its own local switch. That seems straightforward. In fact, most of it is black and white: There can be (and is) no disagreement about what it means for competitors to be serving "with the use of their own local switches" – neither policy evidence nor evidence of alleged operational and economic impairment can have any bearing on that. There also can be (and is) no disagreement about what the rule means by "in the particular market" – it means whatever geographic market the state Commission is examining – and again, the testimony SBC Illinois has moved to strike has no bearing on that. All that leaves is the requirement that to be a triggerette, the competitor must be "serving mass market customers." And the FCC has told us what "mass market customers" are –

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[7] The CLECs, unable to explain how any of their entry barrier testimony actually relates to market definition, resort to desperate measures by observing that the FCC's rule requires that the same geographic markets be used for the trigger test as for the potential deployment test. MCI Br. at 8-9, CLEC Coalition Br. at 6. The idea, apparently, is that evidence that would be relevant to a potential deployment analysis must be relevant to a trigger analysis, because both analyses are performed for the same geographic markets. All the argument really proves, of course, is that there is no limit to how far MCI and the CLEC Coalition will stretch.

they are customers served by any number of DS0 loops up to the DSO cutoff that the Commission is going to establish. *See* 47 C.F.R. § 319(d)(2) and (d)(2)(iii)(B)(4). So what the controversy boils down to is how the Commission will determine whether the competitors who have been nominated as triggerettes "*are serving*" mass market customers.

That is the main hook on which the CLECs seek to hang all their evidence of operational and economic impairment – and all of their policy evidence about the virtues of UNE-P. The CLECs' argument, in a nutshell, is that one must take into account all that evidence – including Mr. Starkey's testimony about IDLC unbundling and entry barriers allegedly associated with "concentrated EELs"; Ms. Lichtenberg's testimony about problems allegedly associated with CSRs, LFACs, E911, directory listings, CNAM and LIDB; and Covad's voluminous testimony about line sharing and line splitting – AND all the testimony about the pros and cons of UNE-P vs. UNE-L just in order to determine whether the triggerette nominees "*are serving*" mass market customers.

Baloney. We can debate how many end users a competitor has to serve in a market to be "serving mass market customers" in that market. And we can debate whether a competitor is "serving mass market customers" if it serves only small businesses, and has no residential customers. But the extent to which alleged problems with LFACs, concentrated EELs and line splitting configurations may or may not constitute barriers to entry has no bearing on the answer to the only question that the FCC's rule calls on the Commission to answer in this proceeding – whether the nominated triggerettes are or are not "serving mass market customers in the particular market with the use of their own local switches."

How, then, do the CLECs try to tie their evidence of alleged operational and economic impairment to the determination whether carriers are "serving mass market customers in the

particular market with the use of their own local switches"? With smoke and mirrors and, at the end of the day, unsuccessfully. Look carefully at MCI's pitch, into which we have inserted numbers for reference below:

> **[1]** [T]he FCC stated that the key consideration in the trigger analysis is whether the providers "are currently offering and able to provide service, and are likely to continue to do so."[16] **[2]** Thus, the first issue is whether the candidate is "*offering"* service, not just whether they are providing service. **[3]** The next question is whether they are "*able to provide*" service. This is the question on which SBC places all its focus. SBC assumes that if a CLEC is providing service then the inquiry ends. It does not. **[4]** Issues remain regarding the type of service and to whom the carrier is offering the service. **[5]** Additionally, the trigger candidate also has to be "*likely to continue*" to offer service. In fact, the FCC explicitly instructs state Commissions to "review whether the competitive switching provider has filed a notice to terminate service in that market."[17] **[6]** The FCC further requires that the trigger candidates must be unaffiliated with the ILEC and must be using their own switches. **[7]** Significantly, the FCC states that the candidates should be "*actively* providing voice service to mass market customers."[18] The FCC's decision to use the adverb "actively" must be given meaning – CLECs must be doing more than just providing. Issues such as network architecture, barriers to entry, how UNE-P is used and how specific carriers provide service are all necessary to provide meaning to the FCC's words and to be sure the FCC's guidance is properly applied.

[16] TRO ¶ 506 (sic; should be ¶ 500).

[17] TRO at n. 1556.

[18] TRO ¶ 499 (emphasis added).

Does any of that actually demonstrate that MCI's testimony about alleged entry barriers and the virtues of UNE-P is relevant? Upon examination, the answer is a resounding "No.":

[1]: An accurate quote, but just sets the stage for the argument that follows; does not itself suggest that impairment or policy testimony is relevant.

[2]: Still does not suggest that impairment or policy testimony is relevant; Commission will not look at impairment or policy testimony to determine that a competitor is "*offering*" service;

[3]: MCI's point here is garbled; is MCI accusing SBC Illinois going astray by focusing only on whether competitor a "*able to provide*" service or on whether a competitor "*is providing*" service? In any event, MCI is just playing with words. If a competitor is serving mass market customers, which is what the rule requires, it is by definition able to serve those customers; nothing about the "able to provide" language in *TRO* ¶ 500 supports the notion that the CLECs' voluminous testimony on economic and operational impairment and the merits of UNE-P is relevant to the question whether a competitor is or is not serving mass market customers with the use of its own switch – which, again, is the only question presented (once the geographic markets have been defined) in this case.

[4]: The extent to which "the type of service and to whom the carrier is offering service" is pertinent to the trigger analysis is debatable. The ALJ need not resolve that debate now, however, because SBC Illinois' motion to strike is not directed at testimony about the type of service any potential triggerette is providing, or about to whom the nominee is offering service.

[5]: *TRO* ¶ 500 does say that the Commission should consider whether a triggerette is "likely to continue" to provide service, and footnote 1556 to ¶ 500 elaborates by saying that states should review whether the competitive carrier has filed a notice to terminate service. But if MCI is suggesting that this bespeaks an FCC intent for state commissions to examine possible causes of economic or operational impairment in order to determine whether a triggerette that is now providing service is likely to continue to do so in the future, MCI is mistaken. It is one thing to inquire into whether the competitor has filed a notice to terminate service – that is straightforward, and it could be a sound reason for not counting the competitor as a triggerette. But it would be quite another thing to try to speculate about the likelihood that a competitor that is now serving mass market customers with its own switch will perhaps discontinue doing so in

the future because of the panoply of supposed entry barriers the CLECs have raised. And the FCC plainly did not envision such an exercise when it promulgated the "objective criteria" of the trigger test in order to "minimize administrative burdens" and "provide bright line rules to guide the state commissions." *TRO* ¶ 498; *see also* SBC Illinois' Motion at 9.

[6]: True, but has no bearing on the motion to strike.

[7]: It is here that MCI finally gets explicit in its effort to link its testimony about alleged entry barriers to the inquiry mandated by the FCC, and the effort is a conspicuous failure. MCI begins with the proposition that although the rule requires only that triggerettes be "serving mass market customers," the FCC must have had in mind something more than mere "serving," because it said in ¶ 499 that the competitive switch providers be "actively providing voice service to mass market customers." That proposition is dubious; any difference between the requirement in the rule that the triggerette be "serving mass market customers" and the statement in ¶ 499 that the triggerette should be "actively" providing service is, to put it mildly, metaphysical. But even assuming for the sake of discussion that the FCC did mean something extra when it used the word "actively," the conclusion MCI draws is pure fantasy: "Issues such as network architecture, barriers to entry, how UNE-P is used and how specific carriers provide service are all necessary to provide meaning to the FCC's words and to be sure the FCC's guidance is properly applied." The Commission has to look at network architecture and entry barriers to be sure that the word "actively" is given its proper meaning? Hardly.

The CLEC Coalition's attempt to tie its testimony of economic and operational impairment to the trigger test (CLEC Coalition Br. at 10-11) is substantially identical and equally unavailing. The inescapable fact of the matter is that once the Commission defines the markets it is going to consider, the only question it may decide in this docket is whether three or more non-

affiliated competitors "*each are serving mass market customers in the particular market with the use of their own local switches*." There may be some legitimate debate around the edges concerning what it means for a competitor to be serving mass market customers, but the notion that the dozens and dozens of pages of CLEC testimony about UNE-P policy and various and sundry alleged entry barriers shed light on the question whether each triggerette is "serving mass market customers" is, if one thinks about it at all rigorously, preposterous.

II. THE OTHER CLEC ARGUMENTS FOR ADMITTING THE CHALLENGED TESTIMONY ALSO FAIL.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *E.g.*, *Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E..2d 239, 244 (Ill. Sup. Ct. 1999). The testimony that SBC Illinois has moved to strike has no tendency to make the existence of any fact that is of consequence to the determination of this action more or less probable than it would be without the testimony; nor, to the extent that the CLECs might distinguish policy from fact, does any of the testimony bear on any policy that is of consequence in this action – the FCC has already established the policy.

In the absence of any link between the challenged testimony and the matters the Commission will be deciding, the CLECs resort to a potpourri of arguments that actually have nothing to do with whether the testimony is relevant. We address these arguments briefly.

A. Background and context.

A traditional refuge for a party that seeks to introduce irrelevant evidence is a claim that the evidence will give the decision-maker important "background" and "context"; the argument is irresistible to a party in the CLECs' position, because just about anything can be pawned off as background and context. And the CLECs do make the argument. *See, e.g.,* CLEC Coalition Br.

at 6 ("The CLECs have submitted testimony that will assist the Commission by providing background and giving context to the analysis it must perform"). The ALJ will decide for himself what will actually be useful background context. SBC Illinois respectfully suggests, however, that when there is more background and context than substance, something is amiss.

B. Opinion Testimony

Sage/Talk argue that the ALJ has discretion to admit opinion evidence, and that opinion evidence is admissible if it will assist to the trier of fact. (Sage/Talk Br. at 3-4.) That argument leads nowhere, though, if the ALJ agrees with SBC Illinois that the testimony it has moved to strike cannot be of assistance to the trier of fact because it has no bearing on the issues presented in the case.

C. The Initiating Order and SBC Illinois' October 6 Rebuttal Notice

MCI observes that the Commission's Initiating Order directed the parties to "raise in their initial filings any arguments that they believe impact the case," and that SBC Illinois' October 6, 2003, Rebuttal Notice, while declaring SBC Illinois' intention to pursue a triggers only case, also reserved SBC Illinois' right to make a potential deployment showing under certain circumstances. (MCI Br. at 5-7.) This MCI point is so transparently bankrupt that the CLEC Coalition chose not to incorporate it in their brief. Obviously, the fact that the Commission directed the parties to raise concurrently all the points they needed to raise does not render relevant in this trigger case evidence that would be relevant only to a potential deployment case that SBC Illinois has since declared it is not pursuing. Similarly, SBC Illinois' reservation, *four months ago*, of the right to pursue a potential deployment case under certain circumstances does not vitiate SBC Illinois' much more recent declarations that it is not, after all, doing so.

D. SBC Illinois' Testimony

Several parties assert that SBC Illinois' testimony, particularly certain testimony of SBC Illinois witness Shooshan, is outside what SBC Illinois' motion contends is the scope of this proceeding. *E.g.*, Sage/Talk Br. at 11; AG-CUB Br. at 1.[8] Therefore, they argue, at least some of the testimony SBC Illinois has moved to strike should be admitted, either because it is responsive to SBC Illinois' testimony or because SBC Illinois' testimony more accurately reflects the scope of the proceeding than SBC Illinois' Motion does. This reliance on SBC Illinois' pre-filed testimony is misplaced. If the testimony SBC Illinois has moved to strike is irrelevant, which it is, it is not rendered relevant by the fact (*if it is a fact*) that some of SBC Illinois' pre-filed testimony crosses the same line. Moreover, no testimony has yet been admitted into evidence – neither SBC Illinois' nor anyone else's. Accordingly, the testimony that SBC Illinois has moved to strike should be stricken, and if other parties believe that application of the same standard requires that some of SBC Illinois' testimony be stricken, they should move to strike it on the same grounds.

E. The Denial of SBC California's Motion to Strike

This is not a jury case. Accordingly, SBC Illinois does not contend that the law *requires* the irrelevant testimony at issue to be stricken. Rather, it contends that the irrelevant testimony *should* be stricken, with the recognition that the ALJ or the Commission may instead choose to admit the testimony in evidence and then disregard it when it comes time to decide the case, and thereby avoid committing a reversible error. Particularly in light of that, the decision of an ALJ in California to deny a similar motion to strike should not carry much weight; at most, it means

[8] "AG/CUB Br." is the People of the State of Illinois and the Citizens Utility Board's Response in Opposition to SBC Illinois' Motion to Strike Irrelevant Testimony.

only that that ALJ was more cautious than SBC would have liked. In addition, though, the rationale of the California ALJ reveals an error that SBC Illinois trusts will not be repeated here. In the passage from the California hearing transcript that the CLEC Coalition quotes (at p. 19), the ALJ states,

> So that's the framework in which I am going to rule on this motion is looking at the operational and economic evidentiary showing in the context of the application of the trigger and definition of the markets *because that's how the CLECs have said they are using that data.*
>
> And since that is an area that no one disagrees is within the relevant scope of the proceeding, on that basis I do not find that the evidence on this is outside the scope of the proceeding. (Emphasis added.)

As the italicized language shows, the California ALJ uncritically accepted the CLECs' claim that they were using their evidence of operational and economic impairment in connection with application of the triggers and definition of the markets. In other words, SBC California argued that the evidence related only to potential deployment; the CLECs said, "no, we are using it for geographic markets and the triggers," and the ALJ accepted that without considering whether the evidence actually had any bearing on those inquiries. Here, SBC Illinois has demonstrated that the evidence of economic and operational and impairment in fact has no bearing on those inquiries. *See supra*, Section I.[9]

III. ALL THE TESTIMONY SBC ILLINOIS HAS MOVED TO STRIKE SHOULD BE STRICKEN.

The ALJ may conclude that SBC Illinois' view of the scope of this proceeding is correct, but may nonetheless be uncertain whether all the testimony SBC Illinois has moved to strike is

[9] SBC California did not get to file a reply in support of its motion to strike, and so had no opportunity to respond, for example, to the CLECs' assertions about market definition by showing, as we have shown here, that there is no overlap between the testimony SBC moved to strike and the testimony that actually addresses market definition.

outside that scope. In this section, we address that possible uncertainty by refuting the principal witness-specific arguments that individual CLECs (and the State) have made in defense of their testimony.

A. MCI

1. Michael Starkey

SBC Illinois moved to strike the testimony of Michael Starkey because none of it is relevant to any issue in the case, not just because it is entitled "Operational Impairment." But SBC Illinois did not have the time or space to explain the irrelevance of each and every irrelevant one of the 64 pages of Mr. Starkey's testimony, and so had to rely (*see* SBC Br. at 13-14) on the facts that (1) Mr. Starkey chose to entitle his testimony "Operational Impairment," which tends to suggest that the testimony is about operational impairment, which, as we have shown, is irrelevant; (2) Mr. Starkey devotes about thirty pages to discussions of IDLC and fiber loop unbundling and concentrated EELs, all of which is patently irrelevant; and (3) Mr. Starkey's own explanation for the relevance of his testimony (*i.e.*, that the Commission should examine how each triggerette has overcome each operational impediment) is clearly wrong.

Strikingly, MCI's response does not even mention the testimony about loop unbundling and concentrated EELs that SBC Illinois cited (and which occupies about half of Mr. Starkey's testimony), and makes no effort to defend Mr. Starkey's contention that the Commission should examine how each triggerette has overcome the operational impediments he discusses. Instead, MCI makes such assertions as the following, each of which is followed by SBC Illinois' response:

- "Mr. Starkey identifies and discusses the operational and technical barriers that MCI and other CLECs have faced in the past. These barriers are directly relevant to a proper (*i.e.*, informed) analysis and market definition." (MCI Br. at 14.)

Response: No, the barriers that MCI and other CLECs have faced in the past have nothing to do either with defining geographic markets, or with deciding whether a competitor is or is not serving mass market customers with its own switch, for reasons we have discussed.

- "His testimony is consistent with the *TRO* mandate that the Commission conclude that an alleged triggering company 'must also be operationally ready and willing to provide service to all customers in the designated market' to be counted as a trigger." (*Id*. at 15, citing to *TRO* ¶ 499).

  Response: There is no such mandate. *TRO* ¶ 499 only requires that *wholesale* triggerettes – not triggerettes that provide their own switching – be ready and willing to provide service to all customers in the market, and SBC Illinois has made clear it is not relying on any wholesale triggerettes. (Paragraph 499 used to appear to extend the same requirement to all triggerettes, but the FCC limited it to wholesale triggerettes in Errata it issued on September 17, 2003. MCI's argument is about five months out of date.)

2. Sherry Lichtenberg

Like Mr. Starkey's testimony, Ms. Lichtenberg's fifty-three pages of irrelevant discussion is not readily susceptible to a paragraph-by-paragraph irrelevance analysis. Accordingly, SBC Illinois took the appropriate approach (SBC Br. at 14) by pointing out that the stated purpose of the testimony, to address "customer impacting operational issues" is itself irrelevant, and by listing a slew of the irrelevant subjects Ms. Lichtenberg addresses – CSRs, the LFAACs database, trouble handling, E911, number portability, directory listings, CNAM and LIDB. In response, MCI takes SBC Illinois to task for merely "identifying certain phrases, terms and titles included in Ms. Lichtenberg's testimony," and argues that the testimony should not be rejected merely because it uses those words. *But those words constitute 100% of the subjects that Ms. Lichtenberg discusses at pages 35-52 of her testimony, and MCI cannot find anything to say about what any of those subjects – CSRs, LFACs or any of the others – has to do with this case*.

MCI also repeats the same blunder concerning *TRO* ¶ 499 that it makes in connection with Mr. Starkey's testimony; it defends Ms. Lichtenberg's testimony on the ground that the

Commission supposedly must find that each triggerette operationally ready and willing to provide service to all customers in the designated market, even though ¶ 499 says no such thing.

B. CLEC Coalition

The lead-in to the portion of the CLEC Coalition's brief that addresses the testimony of its witness Joseph Gillan says everything the ALJ needs to know in order to gauge the relevance of Mr. Gillan's testimony:

> Two points are critical here. First, the Commission must be fully armed with knowledge of the history and the status of competition in Illinois, the forms it takes, how the various forms interrelate and what is likely to result if the market is defined in such a way as to find non-impairment in any of SBC's service territory. In sum, this Commission is charged with making crucial policy decisions in this proceeding, and it must ensure that it is fully equipped with the knowledge and information it needs to make them.
>
> Second, Mr. Gillan does, in fact, discuss the false tension between unbundling and facilities deployment . . . . It . . . is important testimony because it reemphasizes that only a correct application of the triggers will promote the goals of the 1996 Act.

CLEC Coalition Br. at 13-14.

Needless to say at this point:

(1) the Commission does not need to be armed with knowledge of the history and the status of competition in Illinois to apply the FCC's trigger test;

(2) the Commission is not charged with making crucial policy decisions in this proceeding – the FCC has already set the policy, and has charged this Commission with determining whether there each of three competitors is serving mass market customers in a particular market with its own switch; and

(3) the Commission presumably will do its best to apply the triggers correctly without being reminded (by page after page of policy testimony) how important it is.

C. AG-CUB

The Attorney General and the Citizens Utility Board contend that pages 10-15 of Mr. Williams' testimony are relevant to "determin[ing] whether a carrier is 'in the market' before designating it as a 'trigger' carrier." (AG-CUB Br. at 2.) That merely confirms the irrelevance of this testimony. The trigger test does not allow any vague examination of whether a carrier is "in the market," whatever that is supposed to mean. Rather, it asks whether a carrier is "serving mass market customers in the particular market."

Further, even if "in the market" was part of the trigger test, pages 10-15 of Mr. Williams' testimony would still be irrelevant. As the heading to that section of testimony states, pages 10-15 address "The Importance of UNE-P In Maintaining Local Competition: The availability of UNE-P at TELRIC-based process is largely responsible for the dramatic increase in competition for local exchange services in Illinois." Williams Direct at 10. Not one word of that testimony addresses any particular triggerette (or any particular carrier at all). And not one word of that testimony addresses how the Commission could determine how a triggerette is "in the market" (assuming that were a part of the trigger analysis, which it is not).

AG-CUB next assert that pages 10-15 of Mr. Williams' testimony provides "rebuttal" to certain pages of SBC Illinois witness Shooshan's testimony. (AG-CUB Br. at 3-4.) As we explained above, that is no basis for admitting irrelevant evidence.

Third, the only defense that AG-CUB attempts with respect to pages 55-57 of Mr. Williams' testimony is the assertion that those pages provide "context" and are relevant because the "testimony presents evidence in opposition to SBC's attempt to rebut the FCC's national impairment finding." *Id.* In other words, they argue that it is relevant because AG-CUB oppose SBC Illinois. That, of course, is not the test of legal relevance.

Perhaps recognizing the vacuity of this argument, AG-CUB quickly move on, tossing out a cite to two paragraphs of the *TRO* where the FCC states that "actual marketplace evidence" of use of non-ILEC facilities is "highly relevant." *Id.* Of course, that is why the FCC formulated the trigger rules, which require the Commission to examine whether three or more self-provisioners are serving mass market customers with their own switches. Mr. Williams' hysterics that the elimination of UNE-P would be "disastrous" (pp. 55-57) simply have nothing to do with the "actual marketplace evidence" of self-provisioning.

Finally, AG-CUB fall back to their assertion that pages 55-57 provide "context" for the Commission to determine which carriers are "in the market." *Id.* at 6. As explained above, whether a carrier is "in the market" is, as a matter of law, not part of the FCC's trigger test. Thus, this testimony is, as a matter of law, irrelevant to this proceeding, and should be stricken.

D. Covad

Covad asserts that Boone & Murphy's testimony is relevant because it "will assist the Commission" in (1) "defining the markets"; (2) determining whether "exceptional circumstances" are present; and (3) "determining whether CLECs are not impaired without unbundled circuit switching." (Covad Br. at 1-2.) These assertions are frivolous.

Before proceeding to the "merits" of Covad's contentions, though, note that even if the Commission were to engage in some uncabined "impairment" analysis instead of the particular fact-finding tasks delegated by the FCC, Covad's testimony would still be irrelevant. Covad asserts that SBC Illinois' processes for "line splitting *over UNE-P*" are inadequate, discriminatory, and constitute a barrier to entry (Boone & Murphy, pp. 5, 7, 8, 20, 35, 46-47), and complains about *UNE-P* issues it raised with SBC Illinois in March 2003 or before (long before the *TRO*) (pp. 37-47). *See also id.* at 36 ("Please summarize how such operational and OSS issues associated with SBC's *current UNE-P to line splitting migration* process impair

Covad's ability to provide line splitting" (emphasis added)). Covad then asserts that these same "operational and OSS issues . . . must be avoided" with respect to UNE-L processes. *Id.* at 35.

This conclusively demonstrates the irrelevance of Covad's testimony to any issue of "impairment." Covad alleges that it faces the same operational "barriers" both with and without unbundled local switching. If Covad's assertions are correct, then Covad cannot be "impaired" without access to unbundled local switching, because even *with* access to UNE-P it faces the exact same "impairment" – SBC Illinois' line splitting processes – and thus access to UNE-P does nothing to "cure" the impairment of which Covad complains.[10]

Regardless of the possible relevance of Covad's testimony to a hypothetical "impairment" analysis, that testimony is clearly not relevant here. Pursuant to the governing FCC rules, the only issues in this proceeding are (1) defining the geographic markets, (2) applying the FCC's trigger test, and (3) determining the DS0 cutoff. Covad's testimony is relevant to none of those issues.

Boone & Murphy's testimony does not address the geographic markets. Covad asserts that Boone & Murphy's testimony is relevant because the FCC's geographic market rule requires the Commission to consider "'how the number of high-revenue customers *varies geographically* . . . and *variations* in the capability of wire centers to provide adequate collocation space and handle large numbers of hot cuts.'" *Id.* at 6 (quoting *TRO*, ¶ 495) (emphasis added). *See also id.* at 3-5 (same). While Covad quotes the *TRO* correctly, its assertion that its testimony is relevant to that paragraph is false.

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[10] For instance, Covad alleges that "the ILECs' OSS databases" (not SBC Illinois' specifically) can be "inaccurate and incomplete." Boone & Murphy at 18. Of course, if that is true at all, it is true whether a CLEC orders UNE-P or UNE-L, and has nothing to do with "impairment" without access to UNE-P.

As Covad's quotation makes clear, the geographic market rule directs state commissions to consider *geographic variations* in certain factors (like the number of high-revenue customers, collocation space, or hot cut capabilities). But Covad's testimony merely asserts, as a general matter, that CLECs are "impaired" without certain line splitting processes. Not one word of Boone & Murphy's testimony addresses any geographic variation in any factors, or any particular geographies at all. Thus, not one word of that testimony is relevant to the geographic market determination.

It is telling that Covad is unable to explain how this testimony is supposed to assist the Commission in delineating the boundaries of the geographic markets. Indeed, Covad does not even attempt an explanation. Rather, immediately after quoting the FCC's geographic market rule, Covad states: "The entire premise of Covad's testimony is that unless SBC can perform a large number of hot cuts that include high-revenue voice plus data loops, CLECs are impaired without access to unbundled circuit switching." (Covad Br. at 4.) That, of course, is a *non sequitur*, and has nothing to do with defining the geographic markets.

Further, not one word of Boone & Murphy's 50-page testimony even purports to bear on the geographic market issue. If it did, Covad surely would have pointed out that testimony in its brief. Indeed, a word search of Covad's testimony reveals that neither the word "geographic" nor the word "variation" appear anywhere in that testimony.

Boone & Murphy's testimony does not address "exceptional circumstances." The phrase "exceptional circumstances" appears nowhere in Boone & Murphy's 50-page testimony. Nor do the words "exceptional" or "circumstance." Nor does any reference to paragraph 503 of the *TRO*, where the FCC addressed the "exceptional circumstances" exception. Nonetheless, Covad

now attempts to assert (at pp. 5-6) that its testimony is somehow relevant to "exceptional circumstances." That assertion, too, is frivolous.

In support of its new rationale, Covad states:

> As noted above, Covad's testimony demonstrates that unless SBC can perform a large number of hot cuts that include high-revenue voice plus data loops, CLECs' ability to compete is substantially impaired. Until SBC demonstrates that it has in place a proven process for migrating such loops, the Commission should provide CLECs with continued access to unbundled circuit switching in line splitting arrangements even in markets that facially satisfy the self-provisioning trigger. Such a determination must be based on a consideration of all relevant evidence in the proceeding, and there is simply no basis to exclude such evidence at this time. *Id.* at 5-6.

As this passage makes clear, Covad views the Commission's task here as some free-form "impairment" analysis, and equates the "exceptional circumstances" exception to that analysis. As a matter of law, Covad is wrong, for several reasons.

"Exceptional circumstances" is not the same as impairment (or even "substantial" impairment, another phrase that appears in Covad's brief that nowhere in Covad's testimony). Rather, that exception applies only where an "*exceptional* barrier to entry" completely "*forecloses*" additional, "*further* entry" by self-provisioning competitors. *TRO*, ¶ 503 (emphases added). Nowhere does Covad's testimony allege that the "barrier" identified by Covad (an alleged deficiency in SBC Illinois' hot cut processes) completely forecloses competitive entry. Rather, Covad's testimony merely makes general "operational barrier" allegations that might be relevant to a "potential deployment" analysis, but which have no relevance here.

Further, in markets where the self-provisioning trigger is satisfied, the alleged "barrier" identified by Covad *cannot*, as a matter of law, constitute "exceptional" circumstances. That is because those three-plus self-provisioners faced the same alleged "barrier," and yet were able to enter the market – and thus conclusively demonstrated that the alleged "barrier" does not cause

impairment. In other words, Covad does not even purport to identify any exceptional barrier that prevents *further* competitive entry, such as an exhaustion of collocation space (the example given by the FCC).[11]

Boone & Murphy's testimony cannot "assist the Commission in determining whether CLECs are not impaired without unbundled circuit switching" in any lawful manner. Covad asserts that its testimony is relevant to determining "impairment" because the FCC based its national impairment conclusion on "the absence of sufficient hot cut processes" and Covad's testimony "specifically addresses whether SBC's proposed process to migrate loops with voice plus data . . . is sufficient to eliminate such impairment." (Covad Br. at 2; s*ee id.* at 5 (same).) The thrust of Covad's argument is that because the FCC addressed hot cuts in the *TRO*, all testimony addressing hot cuts must be relevant. Covad is incorrect.

The FCC's mass market switching rules do not ask – or allow – the Commission to simply "evaluate impairment for local switching," including alleged impairment with respect to hot cuts *See id.* at 6. Rather, the FCC promulgated *specific rules* that require the Commission to (1) define the geographic markets and (2) apply the FCC's trigger to those markets. Covad does not even attempt to explain how this testimony is relevant to those tasks, or to the FCC's rules. To the extent that Covad's testimony is relevant to evaluating SBC Illinois' proposed batch cut processes, then that testimony belongs in the batch cut docket. But it does not belong in this docket.

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[11] Covad appears to believe that the Commission could simply require SBC Illinois to continue providing UNE-P even where a trigger is satisfied under the guise of "exceptional circumstances." That too is wrong. Rather, the "exceptional circumstances" exception requires the Commission to petition the FCC for a waiver of the FCC's trigger rule.

Covad, not SBC Illinois, is mischaracterizing Covad's testimony. Covad also asserts that SBC Illinois has mischaracterized its testimony. Covad is wrong, and it is Covad that now mischaracterizes its own testimony in an ill-conceived attempt to demonstrate its relevance.

First, Covad asserts that SBC Illinois mischaracterized Covad's testimony in asserting that the thrust of that testimony is "that Covad is 'impaired' by SBC Illinois' current UNE-P-related line sharing and line splitting processes." *Id.* at 7. SBC Illinois refers the Commission to page 5 of Boone & Murphy's testimony, where, in response to the question "What is the purpose of your testimony?", Boone & Murphy state that one purpose is to "identify the numerous and significant operational and OSS problems associated with SBC's current UNE-P to line splitting run time hot cut (migration) process."

Second, Covad asserts that it has not asked the Commission to address "hundreds" of different migration scenarios. *Id.* at 7. SBC Illinois refers the Commission to page 12 of Boone & Murphy's testimony. While Covad states there that only four scenarios "absolutely must be addressed immediately," Covad also attached a list of 240 scenarios (Ex. CB-KM-6) that Covad asserts "should be addressed" by the Commission at some later point.

Third, Covad asserts that it is not "asking this commission to examine line sharing and line splitting process," but that "[a]ll Covad has asked is that voice plus data loops be included in SBC's [hot cut] process." *Id.* at 7-8. SBC Illinois refers the Commission to pages 35-47 of Covad's testimony, where Covad asserts that the Commission must "move forward to address and resolve" at least eleven separate "operational and OSS issues associated with SBC's current UNE-P to line splitting migration process." *Id.* at 35, 47. Covad also proposes an eight-item checklist of "OSS tools" that SBC Illinois should be required to provide (p. 32), as well as numerous other requirements (pp. 19-35).

E. Sage/Talk

1. Dr. Daniel Kelley

Sage/Talk's primary argument in support of admitting the portions of Dr. Kelley's testimony that SBC Illinois has moved to strike is that it responds to the testimony of SBC Illinois witness Shooshan. We have already refuted that argument. *See supra* section II.D. Sage/Talk also say that Dr. Kelley "provides the framework for these parties' theories of the case" – background and context, in other words – and that Dr. Kelley "describes what UNE-P is, and how CLECs rely upon UNE-P to provide services to customers" – a perfect example of "evidence" that has no possible bearing on anything the FCC has charged the Commission with deciding.

2. Dr. George Ford

SBC Illinois has moved to strike two portions of Dr. Ford's testimony. The first is a nine-page section entitled "Innovative Services Available from Z-Tel Because of UNE-P." That sets the stage for the second portion, which is a four page section that leads off with the question "What would be the impact on Z-Tel if UNE-P were limited or restricted in certain geographic areas?" This is, in other words, pure policy discussion, that can play no possible role in the Commission's definition of geographic markets *using the criteria the FCC has provided for that definition* or in the Commission's determination whether three or more carriers in any market are serving mass market customers with their own switch. The defense of Dr. Ford's testimony in the Sage/Talk brief (at 7-8) is odd, because it is devoted primarily to demonstrating the significance of portions of his testimony that SBC Illinois did *not* move to strike.

3. Dana Crowne

The Sage/Talk brief all but admits the irrelevance of the Crowne testimony that SBC Illinois has moved to strike. The thrust of the testimony, according to Sage/Talk (at 9-10) is that

no triggerette can adequately serve the mass market because, as Mr. Crowne says in his testimony (at 10) "IDLC configured loops, as they are provisioned today and as they are envisioned to be provisioned in the *TRO*, are essentially unavailable for use by CLECs serving the mass market with their own switch." Neither Mr. Crowne nor Sage/Talk makes any attempt to tie this discussion of IDLC loops to any particular competitor, so what the argument amounts to (if anything) is that even though SBC Illinois is provisioning IDLC loops "as they are envisioned to be provisioned in the *TRO*," that method of provisioning is so inadequate that no one should be counted as a triggerette.

4. Gabe Battista

SBC Illinois does not seek to strike all of Mr. Battista's testimony, but only the portions identified in the heading on page 19 of SBC Illinois' Motion and repeated above at page 9.[12] With respect to the limited passages SBC Illinois has moved to strike, Sage/Talk first state, correctly (at p. 11), that Mr. Battista gives the basis for Talk's view that "unbundled local switching 'should be preserved under Illinois state law." The Commission cannot consider that view in this case. Nor can the Commission consider in this case the nature of SBC Illinois' duty under section 271 of the 1996 Act to provide unbundled local switching at something other than TELRIC rates, another subject of Mr. Battista's testimony that Talk/Sage seek to preserve.

[12] The body of SBC Illinois' Motion stated that the entirety of Mr. Battista's testimony, except for pages 27-29, should be stricken. That was an error. As Sage/Talk correctly point out, SBC supported its motion to strike only with respect to limited portions of Mr. Battista's testimony; those were the only portions SBC Illinois intended to target.

CONCLUSION

For the foregoing reasons, the Commission should grant SBC Illinois motion to strike the irrelevant testimony identified at page2 3-4 of SBC Illinois' Motion.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Dennis G. Friedman, an attorney, certify that a copy of the foregoing SBC Illinois' Reply in Support of Motion to Strike was served on the parties on the attached service list by electronic transmission on February 17, 2004.

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